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## RECORD OF ORAL HEARING

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte CAROLYN JEAN CUPP, LYNN ANN GERHEART,  
SCOTT SCHNELL, SHERI LYNN SMITHEY, and  
DONNA ELIZABETH ANDERSON

Appeal 2009-003326  
Application 10/037,941

Oral Hearing Held: Thursday, August 13, 2009

Before CATHERINE Q. TIMM, MICHAEL P. COLAIANNI, and JEFFREY B. ROBERTSON, Administrative Patent Judges

ON BEHALF OF THE APPELLANTS:

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Appeal 2009-003326  
Application 10/037,941

1                   The above-entitled matter came on for hearing on Thursday,  
2 August 13, 2009, commencing at 9:07 a.m., at the U.S. Patent and  
3 Trademark Office, 600 Dulany Street, 9th Floor, Hearing Room A,  
4 Alexandria, Virginia, before Jon Hundley, Notary Public.

5                   THE CLERK: Good morning. Calendar No. 47, Mrs. Lynch.

6                   JUDGE TIMM: Good morning, Mrs. Lynch.

7                   MS. LYNCH: Good morning. How are you all doing today?

8                   JUDGE TIMM: Good.

9                   If you have a business card for our court reporter, I'd appreciate  
10 it.

11                   MS. LYNCH: I do.

12                   JUDGE TIMM: You have 20 minutes to present your case.  
13 And you can assume we are familiar with the issues, and you can start when  
14 you're ready.

15                   MS. LYNCH: Okay.

16                   Good morning. My name is Rachel Lynch. I am here on behalf  
17 of Appellants for U.S. Serial No. 10/037,941. The issues on appeal include  
18 two obviousness rejections.

19                   As I'll discuss and as I hope you will agree, the rejections are  
20 improper as a matter of fact and law.

21                   Now before I get into the rejections, I'd like to briefly discuss a  
22 few important aspects of the claimed invention.

23                   Generally the invention relates to dried pet food, which is able  
24 to mechanically clean the teeth of pets. Specifically, Appellants have  
25 discovered that by reducing the density and increasing the size of these

1 pellets, the resultant product can remove more plaque and tartar build-up  
2 than similar pet food products.

3 In this regard, the characteristics of the claimed pet food  
4 include a density that ranges between 16.8 pounds per foot cubed to 20  
5 pounds per foot cubed, in addition to specific dimensional characteristics.

6 Further, the unstriated nature of the present products stem from  
7 a turbulent flow, as opposed to laminar extrusion, which results in small  
8 microscopic air pockets, which form an intercellular structure that is very  
9 sandpaper-like, which helps remove the tartar and plaque from the pet's  
10 teeth.

11 These properties greatly increase the mechanical cleaning  
12 action of the claimed pet food, as is evidenced by the examples at the end of  
13 the specification.

14 The examples indicate first and foremost that there's a better  
15 penetration of these pet food products to the length of the animal's teeth.  
16 And this is found in Examples 1 and 2.

17 In Examples 3 and 4, they show that the presently claimed pet  
18 foods provide reduced amounts of plaque and calculus, and a reduced  
19 gingival index, which allows for improved cleaning over standard pet foods.

20 And finally, Example 5 demonstrates that larger pieces provide  
21 for increased distances of penetration of the teeth into the pet food before  
22 breakage of the pet food.

23 If you are familiar with the claims, there are nine independent  
24 claims. And I'll just skip over those and go right to the rejections, if that's  
25 okay with you.

1               Okay. The Examiner has rejected Claims 1 through 20 and 25  
2 through 33, as being obvious over Hand, Collings, Speck, and Procter. He  
3 also rejects Claims 21 through 24 as being obvious over Hand, Collings,  
4 Speck, and Procter, and further in view of Staples and Simone.

5               Applicants respectfully submit the rejections are improper as a  
6 matter of fact in law, because first, the cited references fail to disclose each  
7 and every element of the present claims, and the skilled artisan would have  
8 no motivation to combine the cited references.

9               Now with respect to the first rejection, Hand, Collings, Speck,  
10 and Procter all fail to disclose the density of the unstriated pet food product.

11               Because Hand, Collings, and Procter are admittedly deficient  
12 with respect to this, the Examiner cites to Speck, for establishing that it was  
13 known at the time of the invention to adapt an extruder's flow characteristics  
14 in order to control the density of the kibble.

15               Now even assuming that Speck discloses this, it still fails to  
16 disclose the claimed density for the unstriated pet food. And specifically,  
17 Speck uses a very specific flow regulator device in the extruder to sort of  
18 meter or regulate the flow characteristics of the extruder.

19               Now the texture of the presently claimed pet food is an  
20 important factor when considering patentability here. Because as I stated  
21 previously, the unstriated pet food, which has microscopic air pockets, helps  
22 to better clean the pet's teeth during chewing.

23               The dense bone-like structure and the sandpaper-like texture  
24 enhance removal of the tartar and plaque. This is a direct product of the

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1 unstriated pet food product, which is manufactured by a turbulent flow, as  
2 opposed to a laminar flow.

3 The Examiner asserts that the density of the pet food product is  
4 obvious, because "the bulk density is an important factor that is considered  
5 during manufacture, because it determines the volume of the packaging or  
6 container required to market the product".

7 The Examiner also asserts that because Hand discloses a  
8 specific density, and because Speck teaches to control the bulk density, that  
9 Appellants' present claims cannot be inventive.

10 Now in contrast, Appellants would submit that simply because  
11 Hand discloses the density of a striated product as opposed to an unstriated  
12 product, and because Speck fails to disclose any specific density with  
13 respect to striated or unstriated, that the present claims are in fact inventive.

14 The skilled artisan would also appreciate that the pet foods  
15 manufactured by turbulent flow are entirely distinguishable from pet foods  
16 manufactured by laminar flow.

17 Accordingly, if the Examiner is allowed to essentially pick tiny  
18 disclosures of each reference in order to find every element of the present  
19 claims, then in fact any invention could be rendered obvious.

20 And in this case, the Examiner has failed to look at the  
21 references as a whole to find a density that's disclosed of an unstriated food  
22 product.

23 With respect to Claims 1 and 13, since neither Hand, Collings,  
24 nor Speck disclosed the presently claimed width, the Examiner relies on  
25 Procter as disclosing kibbles of a size not greater than about half and inch.

1                   As Appellants have argued in the Appeal Brief, that the word  
2 "about" needs to be considered its stylistic and technical content.

3                   And with respect to the stylistic and technical content here, the  
4 skilled artisan would understand that when Procter specifically says "a size  
5 not greater than about half an inch," that means that the pet food product  
6 cannot be greater than about a half an inch with very slight variations either  
7 way.

8                   Because of this, Procter even fails to disclose the width of the  
9 presently claimed pet food product.

10                  Now with respect to reason to combine the cited references,  
11 Appellants respectfully submit that the skilled artisan would not combine  
12 these references, because in fact the two primary references relied on by the  
13 Examiner, which are Hand and Collings, teach away from each other  
14 explicitly in the specification of each.

15                  Also, Appellants submit that the affidavit filed on February 1,  
16 2006 shows very clearly that the unstriated appearance and intercellular  
17 structure that results from the turbulent process here, significantly affects the  
18 performance of the presently claimed pet food products;

19                  And also that real logical and acoustic testing of the unstriated  
20 product of the present invention versus striated products shows that the  
21 products are clearly different and present different functionalities in terms of  
22 dental plaque and tartar reduction.

23                  As a result, the skilled artisan would have no reason to combine  
24 an unstriated reference with a striated reference.

1                   For example, Collings is directed toward an unstriated food  
2 product. And Hand, by contrast, is directed toward an expanded striated  
3 structural matrix, which specifically teaches away from Collings.

4                   Hand requires that the striations on the pet food product be  
5 there for a very specific purpose. In fact, Hand teaches that the pet food  
6 product must have the striated structural matrix, which when chewed by the  
7 animal, will effectively remove tartar, stain, and plaque, because the  
8 striations will fracture and the animal's tooth will be exposed to the pet food  
9 along those striations.

10                  The teeth are then mechanically cleaned by the surfaces of the  
11 separated layers, as the product is chewed by the animal. And as a result,  
12 the striations are essentially required by Hand to provide this mechanical  
13 cleaning action.

14                  Now the Examiner asserts that Hand teaches the conditions  
15 necessary to make both unstriated and striated pet food products, but  
16 exemplifies only the striated product.

17                  In contrast, Appellants submit that, at best, Hand distinguishes  
18 laminar from turbulent flow, and emphasizes that the product in hand must  
19 be created by laminar flow conditions to result in an expanded striated  
20 structural matrix.

21                  As such, Hand teaches away from an unstriated food product  
22 such as that in Collings. And in fact, the Examiner even admits that Hand  
23 does not teach that the product is unstriated.

24                  In contrast, Collings is entirely directed toward an unstriated  
25 dog food product, having improved resistance to breakage on shipping and

1 handling. This is entirely distinguishable from the stress and pressure  
2 induced by an animal's jaw during chewing.

3 Drop tests performed on the extruded dog product from Hand  
4 resulted in unacceptable break rates and prompted the invention in Collings,  
5 which is directed towards a process for manufacturing the dog treat with  
6 strong structural integrity to resist breakage.

7 Now Collings specifically states then when attempting to adapt  
8 the composition and process of Hand to the manufacture of a dog treat, it  
9 was determined that the extruded product lacked sufficient structural  
10 integrity to withstand impact upon like for example, packaging, where it  
11 may be dropped or shuffled around.

12 So Appellants submit that the objectives and purpose for both  
13 Collings and Hand are very different. And the skilled artisan reading one  
14 versus another would not be prompted to look at either or, or vice versa, for  
15 information or a reason to combine them to arrive at the presently claimed  
16 invention.

17 Now the Examiner states that the affidavits submitted do not  
18 establish patentability for a few reasons. One of the reasons cited by the  
19 Examiner is that since Hand discloses turbulent flow as the normal condition  
20 of extruded plasticized animal food products, and since Appellants' claim of  
21 pet foot product produced by turbulent flow, they have not provided any  
22 reason for patentability of the presently claimed invention.

23 Now Appellants submit that Hand also discloses  
24 fiber-containing food products, which are extruded under conditions of

1 turbulent flow, contain fibrous ingredients randomly distributed in the food  
2 product.

3 Specifically, Hand says that when chewed by the animal, these  
4 products crumble rather than fracture and exert limited mechanical cleaning  
5 action on the pet's teeth.

6 So in contrast to the Examiner's assertion, Appellants submits  
7 that this actually aids in demonstrating the patentability of the claimed  
8 invention.

9 For example, if the product manufactured by turbulent flow,  
10 which is normal for pet foods as disclosed in Hand as not providing proper  
11 mechanical cleaning action, and Appellants use the same turbulent flow with  
12 different product characteristics in the presently claimed invention, that in  
13 fact does show that it's different from pet food products manufactured by  
14 turbulent flow, which the Examiner asserts is disclosed in Hand.

15 Now the Examiner also takes issue with the alleged lack of a  
16 nexus between the merits of the claimed invention and the evidence of the  
17 affidavit.

18 Specifically, the Examiner asserts that the affidavit should  
19 compare examples 3 and 4 with the specification of Collings, since Collings  
20 is directed toward an unstriated pet food product and is allegedly the closest  
21 piece of prior art.

22 However, Appellants submit that a comparison of the presently  
23 claimed product with the standard dried dog food provides the proper nexus  
24 between the presently claimed invention and the evidence submitted in the  
25 affidavit.

1                   For example, the Examiner cites Hand as disclosing that  
2 turbulent flow is the normal condition for a standard dry dog food. Similarly  
3 Appellants respectfully submit that a standard dry dog food would most  
4 likely be produced by normal flow conditions, which the Examiner admits  
5 would be a turbulent flow.

6                   As such, Appellants submit that a comparison between a  
7 standard dry dog food, which is manufactured by a turbulent flow and the  
8 presently claimed dry dog food, which is also manufactured by a turbulent  
9 flow, is a reasonable standard for comparison, because the comparison  
10 compares two dry dog foods manufactured by the same process.

11                  Moreover, the comparison even aids in demonstrating that the  
12 presently claimed subject matter is not in fact obvious, if other standard dry  
13 dog foods produced by turbulent flow do not produce the same mechanical  
14 cleaning action as the presently claimed pet foods.

15                  So because Hand and Collings are both directed toward  
16 different products with different objectives, Appellants would submit that  
17 the skilled artisan would have absolutely no reason to combine the cited  
18 references to arrive at the presently claimed invention.

19                  Moreover, Procter relates specifically to ultra-homogenization  
20 of an animal protein containing material before application of heat to the  
21 substance.

22                  Therefore, Procter is entirely directed toward an unrelated  
23 cost-reduction process, which is entirely unconcerned with the extrusion of a  
24 pet foot product that would reduce tartar on an animal's teeth.

1                   Further, Speck is entirely directed toward a process for  
2 mechanically controlling the bulk density of an extruded material, which I  
3 had stated previously uses a very specific flow regulation device to control  
4 the flow through an extruder.

5                   And therefore, Speck is entirely unconcerned with the extrusion  
6 of a pet food product that reduces tartar.

7                   With respect to Claims 21 through 24, Appellants would  
8 respectfully submit that Hand, Collings, Speck, Procter, Staples, and Simone  
9 failed to disclose each and every element of the presently claimed invention.

10                  Specifically Independent Claim 21 requires first and second  
11 kibble sizes in a pet food, the first being larger than the second; and the first  
12 and second being provided in a ratio of approximately 20 to about 80 percent  
13 to approximately 80 to 20 percent.

14                  Now as discussed previously, the unstriated pet food of the  
15 present invention has specific characteristics such as the density, the  
16 unstriated nature, and the size of the pet food, which provides for the  
17 improved mechanical cleaning action in this case.

18                  As stated, the cited references failed to disclose each and every  
19 one of these elements.

20                  Now the Examiner alleges that Hand shows that the extrudate  
21 was cut into 0.32- to 0.75-inch lengths to form pellets, clearly suggesting  
22 that the length of these kibbles were varied. And Appellants respectfully  
23 disagree.

24                  In fact, if you look to the portion of Hand, which is cited by the  
25 examiner, column 7, lines 20 through 22, it states that the strand is cut into

1 0.32- to 0.75-inch lengths to form pellets, and then placed in an oven for  
2 drying.

3 Now Appellants submit that the Examiner has misconstrued  
4 this portion of Hand, when in fact those variations in size are not present in  
5 one batch of manufacturing product, for example, but that these sizes can be  
6 predetermined for specific manufacturing batches, such that the length of an  
7 extrudate should be cut into 0.75 lengths, not 0.75, 0.32, 0.6, and in varying  
8 that manufacturing process. That just wouldn't be an efficient or  
9 cost-effective way to manufacture a product.

10 So in contrast, Appellants submit that the strands are not cut to  
11 form these pellets of varying size from one strand, and are not present in a  
12 ratio of approximately 20 to about 80 percent, as is required by Independent  
13 Claim 21.

14 So for the reasons presently discussed, Appellants would also  
15 submit that Claims 21 through 24 are in fact novel and not obvious, in view  
16 of this, are cited by the Examiner.

17 So in conclusion, Appellants would submit that the Examiner  
18 has failed to state a prime facie case of obviousness, because the cited  
19 references failed to disclose each and every element, and the skilled artisan  
20 would have no reason to combine at least Hand and Procter, because they  
21 are directed toward very different products with very different objectives.

22 Are there any questions that I can answer for you at this time?

23 JUDGE COLAIANNI: I have a question, Ms. Lynch.

24 MS. LYNCH: Yes.

1                   JUDGE COLAIANNI: With regard to the combination, my  
2 understanding is the Examiner took the approach that it would have been  
3 obvious to optimize the particular density, based on the teachings of  
4 Collings and Speck and Hand.

5                   MS. LYNCH: Speck, yes -- right.

6                   JUDGE COLAIANNI: Why would it not have been obvious to  
7 optimize it, based on those particular teachings? It's my understanding that  
8 Hand teaches that the particular density is a result-effective variable. It's  
9 something that you want to control, in manufacturing this dog food.

10                  So why would one skilled in the art not have optimized it, the  
11 particular density, to be within the particular claimed range?

12                  MS. LYNCH: Well, first and foremost, Hand discloses the  
13 density of a striated product, which as I've stated is very different from the  
14 unstriated product of the presently claimed invention.

15                  So Appellants would submit that having the disclosure of a  
16 striated product to optimize that density would not have been obvious to  
17 optimize the density of an unstriated product.

18                  And in fact, the Examiner uses Speck to disclose controlling  
19 extrusion rates. And where in fact Speck is specifically directed toward a  
20 very specific device in this extruder, so the skilled artisan would not look to  
21 a pet food that removes tartar and then a very specific regulation device to  
22 arrive at a density that would provide tartar-removing or plaque-removing  
23 characteristics of a pet food.

24                  It just wouldn't be something that the skilled artisan would look  
25 to arrive at the presently claimed invention.

1                   JUDGE TIMM: Speck is concerned with density, correct?

2                   MS. LYNCH: It does mention density, yes; but its primary  
3 focus is toward this regulation device.

4                   JUDGE TIMM: But the density is for maintaining consistent  
5 product size and package weights? So would you optimize the density in  
6 order to keep the same density, even though the reference doesn't tell you  
7 what density that is --

8                   MS. LYNCH: Possibly --

9                   JUDGE TIMM: You certainly are concerned with density,  
10 maintaining density.

11                  MS. LYNCH: I would argue that it would be more toward flow  
12 characteristics, as opposed to a resulting density. But yes, Speck does  
13 disclose optimizing a density, although it is a very small portion of the  
14 specification.

15                  Are there any further questions I can answer?

16                  JUDGE TIMM: Do we know what the standard dog food  
17 density is?

18                  MS. LYNCH: I don't believe I have that information readily  
19 available.

20                  JUDGE ROBERTSON: Well, Hand says that the density  
21 varies between 10 to 35 pounds per cubic foot.

22                  MS. LYNCH: Right.

23                  JUDGE ROBERTSON: So your claim density is within that  
24 range?

1                   MS. LYNCH: It is. But Appellants submit that it's the density  
2 of the unstriated product, which is important with this invention, because the  
3 intercellular structure, which provides microscopic air pockets, which is not  
4 obtained with the striated product, is what provides the ability for the tooth  
5 to penetrate at least 30 to 40 percent of the thickness of the product to allow  
6 for improved mechanical cleaning action.

7                   Those air pockets just aren't present in a striated product.

8                   JUDGE TIMM: Are those air pockets present in an unstriated  
9 product?

10                  MS. LYNCH: Yes. And that's exactly what we have here is an  
11 unstriated product, which has --

12                  JUDGE TIMM: In the standard product?

13                  MS. LYNCH: In the standard product, the Examiner has  
14 admitted that it's produced by turbulent flow, as opposed to laminar flow,  
15 which is what the striated product is manufactured by.

16                  So I would submit that because of the turbulent flow, that  
17 produces the air pockets, which is also described in depth in our  
18 specification.

19                  So the standard being manufactured by turbulent would in fact  
20 have those air pockets.

21                  JUDGE TIMM: I guess what you would be arguing then, is  
22 that it wasn't known in the art that if you optimized these air pockets and the  
23 density of the dog food that results, that wasn't known to optimize for that  
24 reason?

1                   MS. LYNCH: Well, that's right. The decreasing of the density  
2 and the increasing of the size in combination with these air pockets has  
3 provided this improved mechanical cleaning action, which allows the teeth  
4 to penetrate further.

5                   JUDGE TIMM: But we don't really know what the density was  
6 of the conventional standard product?

7                   MS. LYNCH: No. That is information -- since we are Nestle  
8 Pet Food, Appellants could submit information from the skilled artisan,  
9 indicating that, should prosecution be re-opened.

10                  JUDGE TIMM: Do you have any further questions?

11                  JUDGE COLAIANNI: No further questions.

12                  JUDGE TIMM: Further questions?

13                  JUDGE ROBERTSON: No.

14                  MS. LYNCH: Okay. Thank you for your time this morning.

15                  JUDGE TIMM: Thank you.

16                  Whereupon, at 9:27 a.m., the proceedings were concluded.